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ABSTRACT

Part of a series of classroom aids designed for real estate instructors, this instructional packet was developed to help real estate students understand the landowners' and brokers' legal liabilities resulting from environmental pollution. First, an instructor's presentation, keyed to a series of overhead masters, is provided. Section I offers introductory comments. After a brief discussion of the environmental pollution tort, section II presents research findings related to the Texas courts' decisions on environmental suits; the concept of foreseeability, which indicates that the defendant knew or should have known about the pollution; the duty of care owed by the defendant (landowner/broker) to the plaintiff; determination of causation; and allowable damages. Section III looks at special legal concepts of the environmental tort, including the latency (hidden defect) factor, statutes of limitations, and joint and several liability. Section IV deals with the liability of successor landowners and real estate brokers, while section V suggests preventive steps that successor landowners or real estate brokers may take, such as use of disclaimers, title opinions and title insurance, contracts between predecessor and successor landowners, deciding not to buy or broker, and being aware of activities on or near the property. Finally, section VI offers conclusions. Extensive references to relevant court cases, 18 visuals keyed to the text, and an evaluation form conclude the document. (EJV)

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TEACHERS INSTRUCTIONAL PACKET
TIP No. 7
Fall 1985

LIABILITY OF LANDOWNERS AND REAL ESTATE BROKERS IN ENVIRONMENTAL TORT ACTIONS

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This packet is designed to help real estate instructors clearly communicate with students interested in the legal liabilities of landowners and brokers arising from environmental pollution. The content and materials may be modified as the instructor deems appropriate. Reproduction of materials for student use is encouraged.

TIPS on the TIP

This Teachers Instructional Packet (TIP) is designed to provide the real estate instructor with a classroom aid. Packets have been reviewed carefully, but there is always room for improvement. Your suggestions are welcome.

Introduction to TIP-7

TIP-7 has been developed to help students understand the landowners' and brokers' legal liabilities resulting from environmental pollution. This material is provided as a **supplement** to existing course content. It is not a pat presentation. Instructors should use this material in whatever way best fits their needs.

NOTE: Copies of the TRERC technical report, "Liability of Landowners and Real Estate Brokers in Environmental Tort Actions: Going Beyond the Property Lines," have been provided to Texas lead real estate instructors. Additional copies are available for $1 each ($2 for out-of-state residents). Request publication No. 447. Tierra Grande summaries, "Brokers May Share Onus of Pollution," are available for 25 cents each. Ask for publication No. 461. Instructors may reproduce TRERC reports in full or in part providing no changes are made in the content and providing TRERC is cited as the source.

I. INTRODUCTION

The advent of environmental pollution is not a new concern for the country, although compared to other areas of legal analysis, it is relatively new. The disposal of hazardous waste and toxic chemicals goes on daily in many parts of the United States, both on the surface, in the subsurface, and in inland and offshore waters. At the beginning of the decade, it was estimated that there were 750,000 hazardous waste generators and 50,000 uncontrolled, abandoned and inactive hazardous waste disposal sites in the country. The hazardous polluting agents, disposed in often unknown sites, create danger of permanent, physical harm to the property and to the humans that are affected by the use of the resource.

Texas, with its vast property resources, has not been exempt from such toxic dumping. The question that arises on a large scale basis deals with the effects of such pollution on Texas' environment. More specifically, questions arise as to how daily exposure to pollution affects the average citizen of the state. The legal issue that follows such an inquiry is not only what harm is created by the dumping of such pollution on a given landowner's property or adjacent property to such a landowner, but more importantly, the question arises as to <u>who will bear the cost of injuries</u> resulting from that property damage.

The traditional answer is that the <u>polluting industry</u> would be responsible for resulting injury of environmental pollution. However, more and more cases involve as defendants either <u>landowners</u> who have been conveyed polluted property and who have allowed that pollution to affect injury on an adjacent landowner's property or <u>real estate brokers</u> who have aided in the conveying of property which is affected by environmental

pollution. To what extent such individuals bear the responsibility for the property granted to them or to those who are adjacent to the polluted property will be the inquiry of this paper.

The objectives of this study are fourfold. The research will analyze four areas of interest in relation to the responsibilities of the landowner and the real estate broker and the resulting possibility of their liabilities to a plaintiff in an environmental tort action.[4] Such liabilities will be dealt with in regard to the responsibilities of the landowners beyond their property lines and the responsibilities of real estate brokers when they aid in the conveyance of property adversely affected by toxic or hazardous waste.

First, the research will analyze four necessary areas of concern of the Texas courts to a successful environmental tort action: 1) the defendant knew or should have known of the existence of a harmful agent on or beneath the surface of a given piece of property; 2) the defendant breached the standard of due care; 3) there exists a causal connection between the plaintiff's actual loss or damage and defendant's acts or negligence; and 4) there is a measure of damages that a court will use for awarding relief to a successful plaintiff in a tort action. These elements will be analyzed within factual settings of which defendants have most frequently found themselves a part.

VISUAL #1
COURTS CONCERNS

Second, the research will study the effects of certain specialized legal concepts the landowner or real estate broker should be aware of within the context of environmental tort actions. These legal concepts are 1) the latency factor (viewed especially in connection with the issue of the terminated or bankrupt industry-

VISUAL #2
SPECIALIZED LEGAL CONCEPTS

polluter); 2) the statute of limitations problems (viewed in relation to the latency problems and the discovery of the harm by the would-be plaintiffs in environmental pollution cases); and 3) joint and several liability (viewing the landowner's liability in relation to the industry-polluter's).

Third, the research will analyze those cases that have dealt with successor liability in environmental pollution cases, that is, those landowners who are successors in title to property that has been involved in some way with environmental pollution and that causes harm to adjacent landowners during the successor's ownership and use of the polluted property. The research will look further to a discussion of real estate agents or brokers and their responsibilities and liabilities when they aid in the conveyancing of the property to such successor landowners.

Fourth, the research will analyze preventive steps that will aid the landowners and/or real estate brokers from becoming defendants in an environmental tort suit and will lessen their liability. These steps will be viewed in five different categories. They are 1) the use of disclaimers by landowners and/or real estate brokers to aid in defending liability; 2) the effective use of title opinions and title insurance prior to and after acquisition or conveyancing of the property to trace previous owners who could have polluted or allowed the pollution of the property in question; 3) the use of contracts between predecessor and successor landowners to shift liability from the successor landowner; 4) the decision by the buyer of property not to buy and the broker not to assist in conveying possibly polluted property; and 5) the active awareness of activities on or near the property in question to aid in the knowledge of one's possible liability as

VISUAL #3
PREVENTIVE STEPS

a result of later conveyances. This report will not substitute for competent legal counsel.

II. THE ENVIRONMENTAL POLLUTION TORT

Before turning to the major focus of the paper, it is necessary to understand the nature and the use of the environmental tort by plaintiffs. Traditionally, tort law deals with compensating injured parties for the wrongs committed upon them by other parties.[5] Inherent in this theory of compensation is the legal concept of fault which lies with the defendant. The purpose of the law under tort theory is to analyze the rights of individuals and the use of such rights to the detriment of another party. Conflicts in regard to land ownership set an excellent stage for such legal analysis. Because of the proximity of one landowner's estate in relation to another's, the legal inquiry concerns itself with the "duties" that landowners owe one another as they exercise their rights in relation to their property ownership.

Historically, the tort of trespass to land has been used as a basis for recovery of environment-related damages where waste or debris has been unlawfully deposited onto the plaintiff's property.[6] The historical perspective gained by a study of such early cases as Rylands v. Fletcher, in which the concept of strict liability was first initiated into tort law, sets the background for the modern environmental cases.[7] In Rylands, the case involved the escape of water from a reservoir located on the defendant's land through abandoned mine shafts located under the defendant's property and into the mine operated by the plaintiff. Such an invasion was a basis for a claim under a doctrine, introduced for the first time in English common law, as strict liability.[8] Many other

legal theories are used today as vehicles for compensation in environmental tort cases. Such theories are trespass,[9] nuisance,[10] negligence,[11] and strict liability.[12] Such legal theories do not always distinguish different types of wrongs actionable at common law but rather describe generally different aspects of elements that may be present in a given case.[13]

VISUAL #4
LEGAL THEORIES

In Texas, the courts have allowed the use of the above mentioned theories by a plaintiff in lawsuits when dealing with the environmental pollution cases involving harms inflicted upon landowners. For a plaintiff to make a successful tort claim in the Texas court system, the plaintiff must demonstrate the following: 1) the defendant knew or should have known of the existence of a harmful substance on or beneath the surface of a given piece of property; 2) the defendant breached the standard of due care in relation to the plaintiff; 3) there exists a causal connection between the plaintiff's loss or damage and the defendant's acts or negligence; and 4) there is a measure of damages which a court will use for awarding relief to a successful plaintiff in a tort action.

VISUAL #5
PLANTIFF MUST DEMONSTRATE

A. Texas Courts Look At Environmental Suits: An Introduction

Before turning to the special concerns of the Texas courts in analyzing environmental pollution cases, it is necessary first to look at the environmental tort in general in Texas and how it has been dealt with by the courts. During the past 30 years, the Texas courts have, with frequency, been analyzing the remedies of landowners whose properties were polluted by some action or lack of action by adjacent landowners. As was mentioned earlier, many legal theories may be used in an environmental tort case. An interesting one in which a plaintiff found relief

was in the Atlas Chemical Industries, Inc. v. M.P. Anderson case. The plaintiff alleged damages to his property as a result of discharge of industrial waste elements by the defendant into a creek which crossed the plaintiff's land. The case was based on the theory of intentional discharge of pollutants, and the court set out the following elements as requisite to a successful suit: 1) the actions of the defendant have interfered with the property rights of the plaintiff; 2) the defendant committed an act or omission which constitutes polluting; 3) the actions of the defendant were the cause of the plaintiff's damages or injuries; 4) the actions of the defendant that caused the pollution were intentional; and 5) there is a specific amount of damages claimed by the plaintiff.[14]

VISUAL #6
INTENTIONAL DISCHARGE

Another Texas case that looked at requirements of a successful environmental tort action was the early case of Gulf Oil Corporation v. Vestal. The plaintiff and his wife brought an action for damages as a result of gasoline vapors allegedly escaping from the defendant's wholesale gasoline plant and invading the plaintiff's property. The court stressed the element that the nuisance alleged must create a "material or substantial injury."[15]

The courts of Texas also have allowed relief under legal theories based on the absence or presence of negligence. The Texas Court of Civil Appeals required proof of negligence in a 1968 case in which an oil refinery's industrial waste discharged into a creek and flooded the plaintiff's property[16] and also required proof of negligence in a 1974 crop dusting case.[17] However, it did not require negligence for a successful action in a 1956 case in which the neighboring lessee's salt water disposal pit polluted the plaintiff-farmer's sub-surface strata[18] or in a 1975 case in which the plaintiff's hobby of fishing was ruined

by the dust, flies, feathers, odor and water pollution resulting from runoff from the defendant's turkey pens.[19]

B. Foreseeability: The Defendant Knew Or Should Have Known Of The Pollution

The issue of foreseeability is important in any environmental pollution case. Courts generally have found that the polluters are liable if they continue using substances or allowing harm related to polluting agents after they have or should have recognized the harmful nature of such substances.[20] Many courts, including Texas, use the language of "knew or should have known" when a defendant is described in relation to this foreseeability issue.

Some cases have been rather liberal in their interpretation of the foreseeability factor. In a Ninth Circuit case, a res ipsa loquitur (meaning literally "the thing speaks for itself") was invoked against the defendant whose fluorine fumes escaped from its aluminum smelter despite the complex devices used to keep the emissions to a minimum.[21] In a California case in 1953, the court found the defendant guilty of negligence because of failure to give consideration to adverse weather conditions before starting up a plant, a factor the defendant should have foreseen as causing the harm alleged.[22] An upstream polluter failed to give timely warning to a farmer downstream who used the polluted water for irrigation, and in 1959 the Fifth Circuit found that the harm was foreseeable and such a failure was a cause upon which the plaintiff could rest a successful claim.[23]

It appears that on the whole, the issue of foreseeability is decided on a case-by-case basis, especially in cases in which industry is not yet fully aware of the effects of some pollutants. The issue, therefore, arises as to whether to hold a defendant responsible for

foreseeing a harm that was not known to be possible at the time the defendant acquired land upon which such waste was disposed. Such an issue is unaddressed by the courts.

The Texas courts also have dealt with this foreseeability issue but more in relation to the running of the statute of limitations problems rather than in regard to a landowner's or broker's liability in relation to property upon which environmental pollution has occurred prior to their relation with the property. Generally, the accrual of the action based on toxic tort may be fixed at different times: either when the injury first manifests itself upon the plaintiff, or when the tortious conduct first occurs, or when the plaintiff first discovers (knows) or reasonably should have discovered (should have known) that the injury results from some conduct or omission by the defendant.[24] The Texas courts have analyzed cases in terms of the latter choice of legal reasoning.

VISUAL #7
ACCRUAL OF ACTION FIXED WHEN:

As early as 1956 a Texas Court of Civil Appeals held that when the landowner "first discovered the invasion of the subsurface fresh-water strata by the salt water" was the time period in which the landowner should bring suit and when the legal responsibility of the defendant should arise.[25] The court stated that such discovery should be made with "due diligence."[26] Similar holdings occurred in the 1960's cases of City of Abilene v. Downs and Geochemical Surveys v. Dietz.[27] A recent case, Bayouth v. Lion Oil Company, held that the plaintiff's cause of action accrued when "plaintiffs knew or reasonably should have known of their injury."[28]

Although the Texas courts have not specifically looked at the issue of foreseeability regarding toxic torts in relation to a landowner's or broker's liability, it is reasonable to assume

that, by analogy, Texas courts will set out a duty similar to those expressed in regard to accrual of actions. Such a duty will accrue when the landowner reasonably knew or should have known that there was a polluting agent on the landowner's property (or with the property with which the landowner has dealt or is dealing), and the pollution would cause harm to adjacent landowner's property or persons.

C. Duty Of Care Owed By Defendant To The Plaintiff

One of the areas of special concern in environmental tort cases with which the Texas courts have dealt is that of the duty of care owed by the defendant-landowner or broker to the injured party or plaintiff in a particular suit. Several Texas cases have dealt with this issue.

In 1963 the Texas Court of Civil Appeals stated that a pipeline operator who transports crude oil that leaks from such pipeline and causes injury has a "duty to use ordinary care to prevent its escape and damage to others."[29] This "duty to exercise ordinary care" to avoid harm to others was reiterated in a 1969 pipeline leakage case.[30] In a 1964 and a 1965 case, the Texas courts said that negligence by the defendant was a breach of duty to the plaintiff.[31] This decision upheld a similar Texas Supreme Court decision in which the court stated:

> "We agree that the (owner) has the right to use so much land, both surface and subsurface, as is reasonably necessary. . . . It does not follow, however, that the operator may use either the surface or the subsurface in a negligent manner so as to damage the landowner."[32]

Similar reasoning was asserted by the Texas Supreme Court in the General Crude Oil Company v. Aiken case in which a

surface owner of a ranch sought to recover from an oil well operator for pollution to the plaintiff's underground water supply.[33]

In Burns v. Lamb, a Texas court defined the duty owed to the plaintiff as "not whether he (defendant) acted with due care, but whether his acts occasioned damage."[34] This analysis was reiterated in the Brown case in which the Court of Civil Appeals stated that the duty owed to the plaintiff was the duty not to "intentionally, willfully or wantonly injure water strata."[35]

In a 1980 case that analyzed the duty of the owner or occupier of the land to employees of independant contractors regarding dangers on the premises, a Texas court reiterated the Texas Supreme Court case of Parker v. Highland Park, Inc.[36] which abolished the rule that the owner or occupier of land had no duty toward invited guests as to potential harms.[37] Further the Supreme Court of Texas stated the following rule in Delhi-Taylor v. Henry:

> "While an (occupier of land) owes a duty to employees of an independent contractor to take reasonable precautions to protect them from hidden dangers on the premises or to warn them thereof, an adequate warning to or full knowledge by the independent contractor of the dangers should and will be held to discharge the landowner's alternative duty to warn the employees."[38]

The Delhi case is helpful in two ways. First, it sets out the limits of liability as to the duty of occupiers of land to warn of "hidden dangers" (albeit here the persons to be warned are independent contractors). Second, the case states that the discharge of the landowner's duty comes when such potentially harmed persons are warned of those dangers. It is reasonable to

VISUAL #8
DELHI-TAYLOR V. HENRY

assume such reasoning would extend to occupiers of land that has environmental pollution that might endanger adjacent landowners.

Even if the Texas courts would not wish to extend the Delhi case as stated above, conclusions may be drawn from existing decisions. At a minimum, in regard to the duty owed by the defendant to the plaintiff, it would appear that the defendants may not use their property in a negligent manner so as to damage others or to intentionally or wantonly injure the property of others. At the most, the courts may allow the standard of care owed by the defendants to be the use of the property in a reasonable manner and the exercise of ordinary care to avoid harm to others.

D. Causation And The Texas Courts

In determining a defendant's breach of duty toward the plaintiff in an environmental tort case, a necessary issue which each case must confront is causation. The causation requirement in such cases may be comprised of two separate elements, depending on which court is analyzing the requirement. They are 1) that the plaintiff must establish that the injury incurred was caused by exposure to hazardous waste, and 2) that the plaintiff must show that the defendant was in some way the cause of or the source of the pollution which caused the injury to the plaintiff.[39]

VISUAL #9
CAUSATION

Major problems in the application of this causation factor are the special subject of environmental pollution and the long-term effects of such contamination, also known as the latency factor. Furthermore, the link between the harm done to the plaintiff and the source that caused the pollution is far from automatically assumed. The problem arises when an injury is caused or aggravated by several independent factors, some of which are linked to environmental impairments while others

are not.[40] For instance, in the case of Hagy v. Allied Chemical & Dye Corporation the victim was already suffering from cancer of the larynx, but alleged that the cancer had been "dormant" and was brought to an acute stage by the effect of sulfuric acid fumes emitted by the defendant-corporation.[41]

A further difficulty in the area of causation has occurred where there are a number of sources, all of which have contributed to the pollution.[42] As is pointed out in the case of Farley v. Crystal Coal & Coke Company in which six different coal companies polluted the same stream,[43] there are problems involved as to whether the court will allow joint liability or even separate liability if the court cannot determine which one of the polluters caused the damage. In the Farley case, the court held that the polluters were not jointly liable to the plaintiff. Nor did the court find any single company liable for the damage because the plaintiff could not prove that any single company caused the harm.[44] Other plaintiffs have had similar problems.[45] The result of these court findings is that because the common law has as yet failed to define the causation factor in regard to multiple polluters or aggravation of a past problem by a polluting source, the plaintiff often may find difficulty in establishing the requisite causation for recovery against a landowner who may have been an occupier of property that was a part of a general pollution process.

A further problem related to causation is the unknown long-term effects of certain pollutants. Some cases have been successful in showing that damage has been done immediately;[46] other cases have not been so clear-cut in this area of causation. The latency factor, a result that occurs when certain diseases or effects caused by certain pollutants do not become apparent until 20 or more years after

exposure, epitomizes the problem of long-term effects in the area of tort law.[47]

Because of the difficulties regarding the element of causation in an environmental tort action, a practical question is raised as to whether the plaintiff may have the resources to draw on experts to prove that there is a causal connection between the act of the defendant and the harm to the plaintiff. In answer to this problem, the state of Montana provided a statute that states that when there is damage to a water supply by the same aquifer as mining, the burden is on that mining company to prove that the mine did not cause the damage.[48] Such a statute shifts the economic as well as legal burden onto the potential defendant. Such a shifting of burden may lessen the discouragement of plaintiffs to bring lawsuits. However, there is little indication that Texas would invoke this type of statute that places the burden of proof on the defendant, and as a whole, this statute seems to be the exception rather than the norm. It would appear, then, that because of the cost to the plaintiffs to meet certain burdens of proof, the defendant-landowner or broker is somewhat protected by the very problem which could result in his or her liability to adjacent landowners, that is, the latency and causation factors.

The Texas courts have dealt with the problems of causation in general terms, and although they have not appeared to address the latency factors in terms of causation, they have set up certain standards to which defendants will be held in environmental tort cases. In some of the early cases in the 1950s and 1960s, the courts of Texas, including the Texas Supreme Court, held that there must be sufficient evidence presented by the plaintiff that damage to the plaintiff's land had been "proximately caused" by

the acts of the defendant. (These early cases included Pickens v. Harrison, in which an oil well owner was sued for damage to a rice crop caused by salt water that seeped into plaintiff's irrigation well;[49] Burns v. Lamb, in which salt water escaped to plaintiff's adjacent tract;[50] Crawford v. Yeatts, in which owners of farmland sued for damage caused by negligent disposal of salt water;[51] Scurlock Oil Company v. Roberts, in which plaintiff's land was damaged by crude petroleum leaking from defendant's pipeline;[52] and Scurlock Oil Company v. Harrell, in which leakage of oil from pipeline caused damage to land and water belonging to plaintiff.[53]) Another plaintiff successfully alleged that the causation standard must be that the release of toxic and/or chemical products was a "direct cause of damages" suffered by the plaintiff to the plaintiff's growing cotton crops and land generally.[54] Another court has affirmed in favor of plaintiffs in which they alleged that damages were as a "direct and proximate result" of the acts by the defendants.[55] In a 1974 Texas Civil Appeals case, the court stated that to establish a prima facie case based on intentional discharge of pollutants, the plaintiff must, as one of the requirements for the action, establish that the defendants' actions were the "legal or producing cause of plaintiff's injuries or damages."[56]

Although there are problems in relation to, first, causation as to the source of pollution and, second, latency factors in regard to pollution sources, it would appear that the Texas courts will take a rather fundamental approach to causation. If the source of the pollution may be traced to the defendant-landowner or to the land with which the broker is dealing, then it appears the defendant will have difficulty countering the allegations of causation by a given injured plaintiff.

E. Damages And The Texas Courts

Although amounts of damages may vary from case to case, the theory as to what damages will be allowed has been analyzed in Texas in regard to environmental tort cases. Damages anywhere from $300 to $62,000 or more have been allowed, and there has been no limitation by the Texas courts as to the amount of damages for which a given plaintiff may ask.[57] The limitations, rather, come from the theory under which such damages must be applied.

VISUAL #10
DAMAGE AMOUNTS

Some courts have allowed damage for personal inconvenience. In a 1966 Civil Appeals case, $2,000 was found to be a reasonable compensation for the plaintiffs' "personal discomfort, annoyance, inconvenience and loss of enjoyment of their property."[58] Other cases allow damages for a mere odor. In Meat Producers, Inc. v. McFarland, the plaintiffs were successful in recovering permanent damages from disagreeable odors resulting from the operation of a cattle-feeding facility,[59] while in Lacy Feed Company v. Parrish, the court allowed injunctive relief as to damages incurred from feathers from nearby turkey pens covering the plaintiff's property "like snow" and also from the flies, odor, water pollution and dust from such operations.[60] However, other cases have not allowed injunction by the plaintiff merely because of disagreeable odor pollution without some actual harm suffered by the plaintiff.[61]

In dealing with the issue of damages, the courts of Texas often will analyze a given case as to whether the damages incurred by the plaintiff are of a temporary or permanent nature. It is generally held that, regarding temporary damages to land, recovery by the plaintiff may be only for such damages that have accrued up until the time of trial[62] or for the amount necessary for restoration of the property to its former condition.[63] On the other hand,

VISUAL #11
DAMAGES: TEMPORARY OR PERMANENT

permanent injury to land is viewed by the Texas courts as the difference between the reasonable market value of the land immediately before and immediately after the injury[64] or the depreciation in market value of the property injured.[65] Still other courts use the wording of the measure of damages to be the "diminution of the value" of a given tract of land as a basis for damages by the plaintiff[66] or "loss of value of the land."[67]

One case that discussed such measure of damages in relation to causation, however, held that although recovery of damages to property ordinarily is the difference between the market value immediately before and immediately after the causing damage, such a test is inadequate where there is no isolated event to which all the damages alleged could be attributed.[68] A 1975 court made certain distinctions between the measure of damages to property versus the measure of damages to humans. The court stated that the property measure of damages regarding real or personal property is the difference between the fair market value of the property before and after the alleged injury, while proper measure of damages to living things is the fair market value or the cost of replacement of the lost or killed living things.[69]

It appears, then, that there is no apparent ceiling set by Texas courts regarding damages. Furthermore, since the court is willing to set a standard measure of such damages due to loss of property, that measure of damages will not be a difficult matter for a plaintiff to prove if the other elements of the environmental tort are present, especially the element of causation.

III. SPECIAL LEGAL CONCEPTS OF THE ENVIRONMENTAL TORT

As has been stated earlier, the landowner or real estate broker should

be aware of certain specialized legal concepts within the context of environmental tort actions. Three concepts will be analyzed.

A. The Latency Factor

A latent defect is a hidden defect[70] which does not manifest itself until some time after the manufacturing of a given product. The concept was first introduced in product liability and tort cases dealing with defective products. However, it has moved into other tort areas such as the environmental tort where it is known as the latency factor. As was discussed earlier, this latency concept often is referred to in relation to causation regarding a result that occurs when certain diseases or effects caused by certain pollutants do not manifest themselves until a substantial period of time after the exposure. (See discussion in regard to latency and causation on pages 11-14, supra.) This latency factor presents not only a difficulty in dealing with the causation factor, but it also presents a problem in relation to a subsequent purchaser of property that has once been polluted but where effects of such pollution will not manifest themselves for years to come.

One major aspect of this problem occurs, especially in environmental tort cases, when the plaintiff is faced with the question of whom to sue when a given harm becomes apparent. When the effect of the harm occurs after the dissolution of a corporation or its subsidiary that has used the property to the detriment of later users or adjacent property users, the question regarding whom the plaintiff should sue becomes critical.[71] If the corporation has been dissolved or if the property has been conveyed to a subsequent non-polluting user, who pays the compensation to the harmed plaintiff? Especially in cases of corporate or even individual bankruptcy by the polluting user, it would appear

that the plaintiffs have little or no chance of recovery unless they can turn to the subsequent or present user of the property.[72]

Therefore, the plaintiff seeking damages from injuries caused by environmental pollution must not only identify a defendant, but also must find a defendant who is financially responsible. Often the polluter is unidentifiable, insolvent or minimally solvent, and/or has left the jurisdiction in which suit could be brought. In such cases a plaintiff has incentive to look to a present (and subsequent landowner of the polluted premises) for relief, since other possible defendants are impossible or difficult to find.

B. Statute Of Limitations Problem

Statutes of limitations play a significant role in any law suit.[73] The statutes of limitations are based on the concept that because of the passage of time, the claim may be indefensible because memories fade, witnesses die or disappear and evidence is lost.[74] In the environmental tort cases, when a substantial period of time elapses between the occurrence of the disposal of the hazardous waste and the manifestation of the injury to the plaintiff, the determination of the accrual of the action by the plaintiff often proves difficult.

VISUAL #12
TWO-YEAR STATUTE OF LIMITATIONS BEGINS:

The two-year statute of limitations in tort law traditionally begins to run when the injury "occurs" rather than when it is discovered.[75] However, many courts now are holding that the action accrues when the injury is or should have been discovered.[76] It appears generally that jurisdictions are split as to whether the "discovery" rule or the "injury" rule should be applicable.[77] However, in environmental pollution cases where there often is a problem with latency, it would seem that

the discovery rule is the only logical modern interpretation of the statute of limitations.[78]

The Texas courts have looked at this question of statutes of limitations in environmental pollution cases and generally have held to the "discovery" rule. The early case of Tennessee Gas Transmission Company v. Fromme held that the plaintiff's case was barred by the statute of limitations and that the statute began running when the wrongful act of the water overflow from the gas transmission plant was committed.[79]

Later Texas cases, however, did not follow the Fromme case. As early as 1956, a Texas Court of Civil Appeals held that, for purposes of statute of limitations for pollution of subsurface fresh-water strata by defendant, the statute begins to run from the time the injury became apparent or should have been discovered with due diligence by the owner of the land.[80] In a 1960 action by owners of a farm for recovery of damages caused by negligent salt water disposal (salt water percolated into the water well, polluting it and making in unusable), the court used the discovery rule.[81] In the case of the City of Abilene v. Downs, a Texas court held that when the property owners "acquired knowledge," due to obnoxious odors coming from the city's sewage disposal plant, that their land was damaged, then the action accrued at that time without being barred by the statute of limitations.[82] Similar holdings followed. (Crawford v. Yeatts regarded damage to the owner's farmland by salt water disposal,[83] and Matysek v. Medders regarded pollution of plaintiffs' land by the adjoining property's salt water.[84]) In the recent case of Bayouth v. Lion Oil Company, the Court of Civil Appeals stated that the statute of limitations on the plaintiff's cause of action began to run when the plaintiffs "knew or reasonably should have known" of the injury (here salt

water invasion) and because more than two years had elapsed since that event, the plaintiff-property owners' cause of action was barred by the statute.[85]

For purposes of successor property owner or real estate broker liability, it would appear that the "injury" rule in regard to statute of limitations would be most advantageous, because in most cases the pollution would have injured the property prior to the successor landowner's or real estate broker's association with the polluted and polluting property. However, because Texas courts seem to follow the discovery rule, it would seem that defendants have no protection through the statute of limitations unless the plaintiff knew or should have known of the possible pollution to the property and was untimely in seeking a remedy at law.

C. Joint And Several Liability

The use of the legal concept of joint and several liability is especially helpful in environmental cases because here more than in other types of torts, it is possible for the pollution to be caused from a number of sources, or for negligence to occur because of the failure of the duty of a number of defendants. (See earlier discussion under causation, pages 11-14, regarding the difficulties in determining which of the polluters caused the damage and to what extent each of the defendants is responsible for the harm to the plaintiff.)

The Texas courts discussed the theory of joint and several liability in an early salt water disposal case in which the plaintiff's lake was polluted by salt water and oil allegedly permitted to escape by defendant oil company.[86] In cases when all of the possible defendants are identifiable but the proportion of pollution may be undeterminable, courts have justified the use of joint and several liability:

"Where the tortious acts of two or more wrongdoers join to produce an indivisible injury, that is, an injury which from its nature cannot be apportioned with reasonable certainty to individual wrongdoers, all of the wrongdoers will be held jointly and severally liable for entire damages and injured party may proceed to judgment against any one separately or against all in one suit and if fewer than whole number of wrongdoers are joined as defendants to plaintiff's suit, those joined may by proper cross-action under governing rules bring in those omitted."[87]

Such a decision has two effects on a would-be successor landowner or real estate broker. First, if the elements of the environmental tort are present in an action against the successor landowner or real estate broker, the plaintiff is allowed by the Texas courts to initiate such a suit against one or both of them without joining all the possible wrongdoers in the suit. Second, the burden then falls upon the defendant-successor landowner or real estate broker to plead a proper cross claim and prove joint liability to avoid accepting all the responsibility for the pollution upon the plaintiff's property. If one couples this concept with the latency factor (in which some corporate defendants and even individual defendants may be difficult to find after the passage of a considerable period of time), it appears that a great amount of the burden and responsibility to the plaintiff will fall on the present owner, user or associate of the polluted property which causes harm to others.

VISUAL #13
JOINT AND SEVERAL LIABILITY

In 1968, the court in Burns v. Lamb reaffirmed this concept in a case in which salt water escaped from an oil lease operated by the defendant's decedent on the land adjacent to the plaintiff's property.[88] The concept was

again reiterated in the Crawford v. Yeatts case in which the owner of farmland was harmed by negligent disposal of salt water.[89] In a 1974 case the court reviewed a case in which the landowner sought damages against a carbon processing plant and others. The court determined that, in actions regarding intentional discharge of pollution, "parties discharging pollutants will be held jointly liable absent proof by one or more defendants of lesser damage caused by its or their individual acts."[90]

IV. SUCCESSOR LANDOWNER AND REAL ESTATE BROKER LIABILITY

VISUAL #14
SUCCESSOR LANDOWNER LIABILITY

Under traditional tort law, plaintiffs have looked to the polluting industry to compensate those harmed from toxic dumping. Interestingly, however, a number of recent court cases have tried to place responsibility on landowners who have purchased the polluting property and real estate brokers who have aided in the conveying of the property to successor landowners. These issues and how they have been addressed by the courts will be analyzed for the remainder of the paper.

A. Successor Landowner Liability

Landowners generally are liable for those harms that spread from their property to adjacent properties. However, it is not completely clear whether successor landowners are liable for the harms of their predecessors in title when a case involves environmental torts. Few courts have analyzed the problem to any degree and even fewer have done so in depth and in regard to environmental pollution cases.[91]

In relation to a landowner's liability, when the landowner leases property to another, liability does not shift to the lessee but rather remains with the landowner-lessor.[92] Similarly, when the landowner sells property, it

generally is agreed that within a reasonable time after the sale of the land, the vendor remains liable for any injury caused which the vendor created while owning the property.[93] However, according to some courts, there is some point in time during which logically the vendee discovers or should have discovered the condition. At that point, the vendors no longer are liable for the conditions they might have created.[94] Furthermore, in cases where the discovery of the harm takes as much as 20 years, questions arise as to whether an individual or corporate owner still has the assets with which to compensate a plaintiff for injuries created by such an owner.[95] Some courts state further that unless the condition is deliberately hidden from the vendee by the vendor, the liability resulting from conditions of the land will rest with the present owner.[96]

The prevailing question then, when there has been a long-term condition which has existed during the time when several owners have occupied the land, is which owner(s) will be liable and to what degree? The problem has been intensified by the rule of "no liability after transfer," in which some courts have upheld the notion that there will be no recovery against former landowners or lessees for harms which may be serious and widespread.[97]

In the state of New Jersey, two different cases have dealt with the problem with contrasting outcomes. In the State v. Exxon Corporation case, the New Jersey court held that the successor corporation was not liable for the oil pollution of state waters when the oil was placed on the property by the defendant's predecessor and escaped without the defendant's knowledge.[98] However, the New Jersey court in New Jersey Department of Transportation v. PSC Resources, Inc. held that the successor corporation was liable for property damage resulting from both its

own activities and the activities of its predecessor corporation when the successor corporation continued its predecessor corporation's activities of a waste disposal operation which caused harm to the plaintiff's land.[99]

In another case, the Supreme Court of Pennsylvania held that the Department of Environmental Resources was correct in its order which imposed liability on a successor corporation for the polluting of plaintiffs' water as a result of the activities of its predecessor.[100] In a recent New Jersey case, the court appeared to follow the PSC Resources case when it stated:

> "Original and succeeding operators of mercury processing plant, corporation which created successor operator for sole purpose of purchasing and operating the processing plant, and corporation into which successor operator merged were liable under common-law principles for abatement of resulting nuisance and damage from mercury spillage, where operators were at all times engaged in abnormally dangerous activity of dumping toxic material, merged corporation expressly assumed liability as a provision of merger, successor operator was more division of its parent than independent subsidiary and after parent's sale of its subsidiary's stock, parent, as adjacent landowner of operator, permitted operator to dump mercury onto its land."[101]

The court went on to say that both the original corporation and the successor corporation were jointly and severally liable for cleanup and removal of mercury from the polluted creek area.[102]

In a 1983 decision, the Supreme Court of Kansas held that oil company defendants were liable to plaintiff

landowner under the Oil Well Pollution Act to recover for the salt water pollution of the landowner's fresh water well. Such liability existed against the Atlantic Richfield Company, successor to Sinclair Prairie Oil Company; Mobil Oil Corporation, successor to Magnolia Petroleum Corporation; and the Marathon Oil Company, successor to Ohio Oil Company, Inc.[103] A similar decision in California held that property owners who were plaintiffs could not recover against the defendant steel company's factory on a trespass theory, although it could attempt to recover on a nuisance theory. In the case, the predecessor had first begun the polluting activity which was expanded by the successor in title.[104]

The problem with the analysis of such cases is that most of them, if not all, involve corporate defendants who are successors in interest either by merger or consolidation to the predecessor corporation's property interest. It is a general principal in corporate law that the liabilities and debts of a purchased corporation do not always transfer automatically to the purchasing corporation.[105] However, the successor transferree corporation does assume its predecessor's liabilities when there exists a statutory merger,[106] a sale of stock that acknowledges that the purchased corporation is a subsidiary of the purchasing corporation,[107] or when there is a consolidation of the two corporations (as when the first two corporations cease to exist and a third and completely new corporation is formed).[108] Whether or not this line of successor liability cases would extend to individuals would be a matter for later courts to determine. Certainly, the courts have set precedent for such a line of reasoning through the decisions based on successor corporate liability.

The Texas court has looked at this problem only in a general manner. In Murfee v. Phillips Petroleum Company, where the owners of a surface estate of a ranch brought an action against the oil and gas lessees and producers for pollution of plaintiff's underground fresh water supply, the plaintiffs were unsuccessful in their suit at the trial court level and the trial court decision was upheld by the Texas Civil Court of Appeals.[109] In the suit Phillips Petroleum Company was allowed by the court to be sued as successor by merger to the leasehold estate. Again whether liability rests with successor landowners or corporations who did not acquire property interests by sale of stocks, merger or consolidation is open to conjecture. As stated before, other states' and Texas' courts have laid the groundwork for such a burden of liability.

The issue as to whether successor landowners will be liable for the environmental torts that were caused by their predecessors in title has been inadequately addressed by the court systems. It would be wise to assume, however, that liability certainly will rest with successor landowners if they reasonably knew or reasonably should have known of the harm being caused by their property at the time of acquisition. It is possible, moreover, that the successor landowners will become liable for the environmental torts of their predecessors at the time the landowners know or should have known of such injury to adjacent landowners, even if that knowledge occurs after the successor landowners have held ownership for a period of time.

B. Real Estate Broker Liability

When real estate brokers assist in promoting, listing and selling a given piece of property, they incur a number of legal duties to several different people involved in the undertaking such

VISUAL #15
REAL ESTATE BROKER LIABILITY

as the seller, the buyer, the lender, the closing agent, other brokers and the client.[110] In a discussion of such a broker liability, one author has written:

> "To set the stage for a discussion of the broker/customer relationship, it is first necessary to distinguish that context from the duties owed a client. The principal, usually the seller, has a written employment contract with the brokerage containing express promises and conditions. Thus, a breach of the listing agreement by either party may give rise to an action in contract. Liability has also been found on a loose theory of malpractice, i.e., that the broker has failed to live up to an implied, or perhaps express, warranty of minimal professional competence. Further, liability may be predicated on any of the tort principles, assuming, of course, that an initial duty of care was owed under the facts at issue. The final and most important foundation upon which to base a cause of action, is covered by the general umbrella of principal/agency law."[111]

Some courts have disposed of the broker's liability on a simple negligence theory.[112] In one case the agent acted in good faith but still negligently failed to disclose the existence of certain restrictive covenants which had an adverse effect on the plaintiff's property.[113] The court stated that <u>real estate agents have "a duty to exercise care in dealing with their principals and are liable for any damage caused by a breach of that duty."</u>[114]

The most <u>critical issues</u> that usually arise in regard to broker liability are 1) the <u>nature of the duty</u> owed by the broker to the client or

<u>VISUAL #16</u>
BROKER LIABILITY ISSUES

injured party[115] and 2) the standard by which the duty will be weighed (if it is found).[116] In Texas such duties are set out in the Texas Deceptive Trade Practices Act (DTPA) which provides relief to customers who feel they have been injured in some way in their relationship with their real estate broker.[117] Under this act, any misrepresentation, whether it is in good faith or bad faith, creates an actionable cause.[118] Beyond the enforcement provided under the DTPA, there also is a standard of professionalism which the real estate industry has set out through certain standard requirements of proficiency and licensing statutes.[119]

It would appear that, in relation to such duties owed by brokers to their clients, if a broker knew or should have known that such polluting activities have or could have taken place on the property which the broker is assisting in conveying to the vendee, the broker may be held liable under the Texas Deceptive Trade Practices Act. Such a duty, it seems, may rest with the broker, whether or not this duty of care was negligently breached in good faith or in bad faith.

V. PREVENTIVE STEPS THE SUCCESSOR LANDOWNER OR REAL ESTATE BROKER MAY TAKE

It is unlikely that successor landowners or the real estate brokers in environmental tort cases regarding property that they were conveyed or assisted in conveying will find themselves uninvolved. The best way to prevent an environmental tort suit is to deal with its possibility before it occurs. Below are listed examples of some preventive steps the successor landowner and real estate broker may take to lessen their liabilities.

VISUAL #17
PREVENTIVE STEPS

A. Use Of Disclaimers

A disclaimer is defined as "(t)he repudiation or renunciation of a claim or power vested in a person or which he has formerly alleged to be his. . . .The disapproval, denial, or renunciation of an interest, pright, or property imputed to a person or alleged to be his."[120] The use of such a disclaimer by the real estate broker in the contract with the vendor, and by the landowner-vendee in the deed, as to a lack of knowledge of any present pollution upon the property may be helpful to the successor landowner's or real estate broker's case. This would be especially true if the predecessor landowner warrants that there are no existing pollution-causing agents on or under the surface of the property that would cause harm to the property or to adjacent properties. In such a way, the broker and successor landowner may shift the negligence and guilt of the knowledge of the pollution's existence to the predecessor landowner. It should be noted that disclaimers are not the complete answer to prevent liability. They may, however, lessen one's involvement in some cases.

B. Title Opinions And Title Insurance

In any conveyance, it is usual for grantees and real estate brokers to deal with either title opinions or title insurance to guarantee that title to the property will pass unencumbered to the grantee. It would be helpful for both the successor landowner and real estate broker to look at such title opinions to trace previous owners who potentially could have polluted or allowed pollution of the property in question. Predecessors in title commonly known to create pollution problems on property (often done with no intention of harm to the property) may provide clues to either the acquiring landowner or the real estate broker of the possibility of environmental waste deposits that harm the property and in turn may pass to adjacent properties.

C. Contracts Between Predecessor And Successor Landowners

Given such knowledge of a possible polluting source by a prior user or owner of the property, the successor landowner may then make contractual agreements with predecessor landowners regarding liability if there are later environmental suits. Such agreements might include clauses that shift the burden of liability away from the successor landowner.

D. The Decision Not To Buy Or Broker

The potential successor landowner who has reason to believe that a given tract of land may carry with it the potential for involvement in environmental tort cases may make a reasoned decision not to purchase such a property. In turn, the real estate broker who has reason to believe the same may wish not to assist in the conveying of such property.

E. Awareness Of Surrounding Activities

Often the title opinion itself or even a diligent search regarding previous activities on the property will not turn up any possibility of environmental pollution at the time the property is conveyed to the successor landowner. It is necessary therefore that the successor landowner, and even the real estate broker who continues to conduct business in the area, be aware of the activities on or near the property (not only before the conveyancing, but during and after) to aid in the knowledge of one's possible liability as a result of earlier or even later conveyances. Just because lands adjacent to the landowner are presently unharmed does not mean that such lands will not be used for environmental pollution at a later time. If landowners are aware of such pollution, which pollution also affects their land, and in turn affects adjacent properties,

then it is possible that since the landowners knew or should have known the property was being used as a conduit for a polluting source, they will hold some liability for such knowledge. The timely inspection of possible pollution sources may detect present contamination before it causes harm to the property itself or to adjacent properties.

VI. CONCLUSION

As Texas property owners and property users are adversely affected by pollution, problems will arise as to who will be responsible for such pollution and its resulting adverse effects. The environmental pollution problem affects not only property and environment but also may have personal effects on the property owners and real estate brokers of the state of Texas, depending on their relation to the property. Such a relation may be either as intermediaries to the sale of such property, in the case of real estate brokers, or as individuals who retain or sell their property, as in the case of successor landowners. In dealing with property as a resource, one must go beyond the existing property to an awareness of its effects on adjacent property owners and users. In purchasing and conveying property, one must be aware of the past uses to which the property has been put. The time to do this is prior to the conveyance of the property, not on receipt of a notice of an environmental tort action.

VISUAL #18
PERSONAL EFFECTS

As the courts must deal with analyzing such situations and allocating who bears the burdens, both successor landowners and real estate brokers alike will be more able to prepare themselves for effects of environmental eventualities. Until such time, it will be up to those associated with the property to do everything that is possible to create an awareness of and a subsequent remedy to the pollution problem before it spreads beyond the property lines.

REFERENCES

FOOTNOTES

[1] 9 ENVIR.REP. (BNA) 2085 (1979).

[2] Office of Water and Waste Management, U.S. Environmental Protection Agency, Everybody's Problem: Hazardous Waste, 13 (SW-826) (1980).

[3] For a general discussion on hazardous waste and hazardous waste law, see Hazardous Waste: Third Party Compensation for Contingencies Arising From Inactive and Abandoned Hazardous Waste Disposal Sites, 33 S.C.L. Rev. 543 (1982).

[4] Such an environmental tort action is instituted as a common law remedy. This paper will not discuss statutory relief available to parties injured by environmental pollution. (See Footnote 72 regarding general inadequacies of statutory relief.) Pages 5-8, infra, discuss generally traditional common law remedies to environmental injuries.

[5] The word "torts" in French means "wrongs."

[6] Walters v. McElroy, 151 Pa. 549, 25 A. 125 (1892); Martin v. Reynolds Metal Co., 221 Or. 86, 342 P. 2d 790 (1959), cert. denied, 362 U.S. 918 (1960).

[7] Rylands v. Fletcher, L.R. 3 H.L. 330 (1868).

[8] Id.

[9] Trespass is defined generally as the doing of an unlawful act in an unlawful manner to the injury of another's person or property. Waco Cotton Oil Mill of Waco v. Walker, 103 S.W. 2d 1071, 1072 (Tex. Cr. App.).

[10] Nuisance is defined as anything that is injurious to health, or is indecent or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property. Baltimore and P.R. Co. v. Fifth Baptist Church, 137 U.S. 568, 11 S. Ct. 185.

[11] Negligence is defined as the omission to do something that a reasonable person, guided by ordinary considerations, would do, or the doing of something that a reasonable and ordinary prudent person would not do. Wichita Valley Railway Company v. Meyers, 248 S.W. 2d 444, 447 (Tex. Civ. App.).

[12] A strict liability case is one when neither negligence nor care, neither good nor bad faith, neither knowledge nor ignorance will save the defendant. It is the concept of the defendant being strictly liable without fault placement. Fresno Air Service v. Wood, 43 Cal. Reptr. 276, 279.

[13] For a general discussion of legal theories used in regard to environmental pollution cases see Pfennigstorf, Environment, Damages and Compensation, American Bar Foundation Journal, (Cum. Index 1976-79) 1979, 353.

[14] Atlas Chemical Industries, Inc. v. M.P. Anderson, 514 S.W. 2d 309 (Tex. Civ. App. 1974), aff'd 124 S.W. 2d 681 (Tex. 1975).

[15] Gulf Oil Corporation v. Vestal, 231 S.W. 2d 523 (Tex. Civ. App. 1950).

[16] Gillum v. Rogers, 430 S.W. 2d 822 (Tex. Civ. App. 1968).

[17] Sun Pipe Line Co., Inc. v. Kirkpatrick, 514 S.W. 2d 789 (Texas. Civ. App. 1974).

[18] Gulf Oil Corporation v. Alexander, 291 S.W. 2d 792 (Tex. Civ. App. 1956), reh. denied 295 S.W. 2d 901 (Tex. 1956).

[19] Lacy Feed Company v. Parrish, 517 S.W. 2d 845 (Texas. Civ. App. 1975).

[20] Heck v. Beryllium Corporation, 424 Pa. 140, 226 A. 2d 87 (1966).

[21] Reynolds Metals Co. v. Yturbide, 258 F. 2d 321 (9th Cir.), cert. denied, 358 U.S. 840 (1958).

[22] Hagy v. Allied Chemical and Dye Corporation, 122 Cal. App. 2d 361, 265 P. 2d 86 (1953).

[23] American Cyanamid Company v. Sparto, 267 F. 2d 425 (5th Cir. 1959).

[24] Birnbaum, Statutes of Limitations Problems in Environmental Tort Suits, in Toxic Torts, 412 (P. Rheingold ed. 1977).

[25] Gulf Oil Corporation v. Alexander, at 795, supra note 18.

[26] Id.

[27] City of Abilene v. Downs, 350 S.W. 2d 642 (Tex. Civ. App. 1962); Geochemical Surveys v. Dietz, 340 S.W. 2d 114 (Tex. Civ. App. 1960).

[28] Bayouth v. Lion Oil Company, 651 S.W. 2d 423 (Tex. App. II Dist. 1983).

[29] Scurlock Oil Company v. Roberts, 370 S.W. 2d 755, 757 (Tex. Civ. App. 1963).

[30] Scurlock Oil Company v. Harrell, 443 S.W. 2d 334 (Tex. Civ. App. 1969).

[31] Christy v. Hamilton, 384 S.W. 2d 795 (Tex. Civ. App. 1964); Currey v. Ingram, 397 S.W. 2d 484 (Tex. Civ. App. 1965).

[32] Brown v. Lundell, 344 S.W. 2d 863, 865 (Tex. 1961).

[33] General Crude Oil Company v. Aiken, 344 S.W. 2d 668 (Tex. 1961).

[34] Burns v. Lamb, 312 S.W. 2d 730, 733 (Tex. Civ. App. 1958).

[35] Warren Petroleum Corporation v. Martin, 153 Tex. 465, 271 S.W. 2d 410 as cited in Brown v. Lundell, 334 S.W. 2d 616, 619 (Tex. Civ. App. 1960).

[36] Parker v. Highland Park, Inc., 565 S.W. 2d 512 (Tex. 1978).

[37] Schley v. Structural Metals, Inc., 595 S.W. 2d 572 (Tex. Civ. App. 1980).

[38] Delhi-Taylor v. Henry, 416 S.W. 2d 390, 394 (Tex. 1967).

[39] Hazardous Waste: Third Party Compensation for Contingencies Arising From Inactive and Abandoned Hazardous Waste Sites at 569, supra note 3.

[40] Diamond v. General Motors Corporation, 20 Cal. App. 3d 374, 97 Cal. Rptr. 639 (1971).

[41] Hagy v. Allied Chemical and Dye Corporation, supra note 22.

[42] Automobile traffic is a good example of this kind of problem. The court in Diamond v. General Motors Corporation, 20 Cal. App. 3d 374, 97 Cal. Rptr. 639 (1971) stated that the fact there were a large number of polluters who also were victims made it impractical to litigate such a claim in a class action on behalf of the residents of Los Angels County (approximately 7,119,184 persons) against 293 named industrial corporations and municipalities and against 1,000 unnamed individuals. Damages sought were in the billions of dollars and injunctive relief also was sought. The court found that the remedies requested were preempted by federal legislation.

[43] Farley v. Crystal Coal and Coke Company, 85 W. Va. 595, 102 S.E. 265 (1920).

[44] Id.

[45] Rogers v. Bond Brothers, 279 Ky. 239, 130 S.W. 2d 22 (1939).

[46] Such a case was Reserve Mining Company v. Environmental Protection Agency in which the Supreme Court of Minnesota ordered a land disposal site to be constructed so that taconite would cease to be deposited (approximately 67,000 tons a day) into Lake Superior. The plaintiffs in that case were able to prove that the pollutant had caused three deaths. Reserve Mining Company v. Herbst, 256 N.W. 2d 808 (Minn. 1977).

[47] An example of such a case is United States v. Reserve Mining Company, 380 F. Supp. 11, 40-41 (D. Minn. 1974), in which medical information stated that asbestos workers who had less than 20 years exposure had resulting normal x-rays, while those workers for whom 20 years had elapsed since the beginning of the exposure had mostly abnormal x-rays. Because of the necessary lapse of time for some diseases or injuries to become apparent, the proof of causation can be difficult in tort law in environmental cases. The problem in such cases, of course, is that medical science simply does not know the effect of some toxic substances on the human system.

[48] Mont. Rev. Codes Ann., Section 50-1-55 (3)(a) (Cum. Supp. 1977).

[49] Pickens v. Harrison, 252 S.W. 2d 575 (Tex. 1952).

[50] Burns v. Lamb, supra note 34.

[51] Crawford v. Yeatts, 395 S.W. 2d 413 (Tex. Civ. App. 1965).

[52] Scurlock v. Roberts, supra note 29.

[53] Scurlock v. Harrell, supra note 30.

[54] Petroleum Processing, Inc. v. Roemer, 396 S.W. 2d 528, 529 (Tex. Civ. App. 1965).

[55] Livestock Feeder Company v. Few, 397 S.W. 2d 297 (Tex. Civ. App. 1965).

[56] Atlas Chemical Industries, Inc. v. Anderson at 313, supra note [illegible]

[57] Examples are Currey v. Ingram, 397 S.W. 2d 484 (Tex. Civ. App. 1965) ($300 award to surface lessees for the loss of profits because of reduced crops as a result of salt water damage to the crops, plus damages for death of livestock); Neely v. Community Properties, Inc., 639 S.W. 2d 452 (Tex. 1982) ($62,000 flood damage to land from adjacent apartment complex); Petroleum Processing, Inc. v. Roemer, 396 S.W. 2d 528 (Tex. Civ. App. 1965) ($5,500 for loss of value to land, $8,261 for crop damage and $10,000 exemplary damages); Crawford v. Yeatts, 395 S.W. 2d 413 (Tex. Civ. App. 1965) ($17,064 damages for permanent harm from salt water pollution caused by oil lease operator.)

[58] Neuhoff Brothers Packers, Inc. v. Janek, 405 S.W. 2d 233 (Tex. Civ. App. 1966).

[59] Meat Producers, Inc. v. McFarland, 476 S.W. 2d 406 (Tex. Civ. App. 1972).

[60] Lacy Feed Company v. Parrish at 849-50 supra note 19.

[61] Garland Grain Company v. D-C Home Owners Improvement Association, 393 S.W. 2d 635 (Tex. Civ. App. 1965).

[62] City of Abilene v. Walker, 309 S.W. 2d 494 (Tex. Civ. App. 1958).

[63] Burlington-Rock Island Railroad Company v. Newsom, 239 S.W. 2d 734 (1951).

[64] Id; General Crude Oil Company v. Aiken, 335 S.W. 2d 229 (Tex. Civ. App. 1960), rev'd General Crude Oil Company v. Aiken, 344 S.W. 2d 668 (1961); Gulf Oil Corporation v. Vestal, 231 S.W. 2d 523 (Tex. Civ. App. 1950); Lone Star Gas Company v. Thomas, 345 S.W. 2d 884 (Tex. Civ. App. 1961).

[65] City of Lubbock v. Tice, 517 S.W. 2d (Tex. Civ. App. 1974); Haynes v. Ownby Drilling Company (Tex. Civ. App. 1954).

[66] Scurlock Oil Company v. Harrell, supra note 30.

[67] Reading & Bates Offshore Drilling Company v. Jergenson, 453 S.W. 2d 853 (Tex. Civ. App. 1970).

[68] Burns v. Lamb, supra note 34.

[69] Atlas Chemical Industries v. Anderson, supra note 14.

[70] Ross v. Tynes, 14 So. 2d 80, 83 (La. App.)

[71] Reserve Mining Company v. Herbst 256 N.W. 2d 808 (Minn. 1979).

[72] The Superfund legislation often aids in defraying the cost of cleaning up inactive and abandoned sites. 42 U.S.C. Section 9601 (Supp. 1980). However it fails to compensate injured parties for property and personal damages caused by the releases from inactive and abandoned sites. Under the legislation, as at common law, it often is difficult to show a causal relationship between exposure to a specific waste and the adverse effect on the plaintiff. 42 U.S.C. Sections 9604 (i), 9611(c)(4) (Supp. 1980).

Other legislative products of Congress are the Solid Waste Disposal Act of 1965 (42 U.S.C. Sections 6901-6987, 1976) and the Resource Conservation and Recovery Act of 1976, known as R.C.R.A. (45 Fed. Reg. 33,085, 1980), which were to set up water management systems. Neither of these acts, however, has established a basis of remedy for private individuals harmed by hazardous pollution.

Other environmental statutes that have been enacted for the purpose of protecting public lands and water resources are Clean Water Act, 33 U.S.C. Sections 1251-1371 (1976 & Supp. III 1979); Clean Air Act, 42 U.S.C. Sections 7407-7607 (1976 & Supp. III 1979); and Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C.A. Sections 9601-9615, 9651-9657 (West Special Pamphlet 1980).

[73] The effect of a statute of limitations is that it bars claims of the plaintiff who does not bring a suit against the defendant within a specified statutory period of time.

[74] Order of R.R. Telegraphers v. Railway Express Agency, Inc., 321 U.S. 342, 348-349 (1944).

[75] Gary Milhollin, Long Term Liability For Environmental Harm, 41 UNIVERSITY OF PITTSBURGH L. REV. (Fall, 1979).

[76] Neel v. Magna, Olney, Levy, Cathcart & Gelford, 6 Cal.3d 176, 491 P. 2d 421, 98 Cal. Rptr. 837 (1971).

[77] 51 AM. JUR. 2d Limitations of Actions, Sections 136, 137 (1970).

[78] Daniels v. Beryllium Corporation, 227 F. Supp. 591 (E.D. Pa. 1964).

[79] Tennessee Gas Transmission Company v. Fromme, 269 S.W. 2d 336 (Tex. 1954).

[80] Gulf Oil Corporation v. Alexander, 291 S.W. 2d 792, 795 (Tex. Civ. App. 1956).

[81] Geochemical Surveys v. Dietz, 340 S.W. 2d 114 (Tex. Civ. App. 1960).

[82] City of Abilene v. Downs, supra note 27.

[83] Crawford v. Yeatts, supra note 51.

[84] Matysek v. Medders, 443 S.W. 2d 929 (Tex. Civ. App. 1969).

[85] Bayouth v. Lion Oil Company, supra note 28.

[86] Landers v. East Texas Salt Water Disposal Company, 248 S.W. 2d 731 (1952).

[87] Id at 734.

[88] Burns v. Lamb, supra note 34.

[89] Crawford v. Yeatts, supra note 51.

[90] Atlas Chemical Industries, Inc. v. Anderson, supra note 14.

[91] A successor landowner has been generally defined as a purchaser of land which "poses a threat to the environment due to conditions created by hazardous wastes." Successor Landowner Liability For Environmental Torts: Robbing Peter to Pay Paul, 13 Rutgers Law Journal, 329, 332, note 10 (1982).

[92] W. Prosser, Handbook of the Law of Torts, Section 63 (4th ed. 1971).

[93] Id at Section 64.

[94] Seattle First National Bank v. State, 14 Wash. App. 166, 540 P. 2d 443 (1975); O'Connor v. Altus, 67 N.J. 106, 335 A. 2d 545 (1975); Sparling v. Peabody Coal Company, 59 Ill. 2d 491, 322 N.W. 2d 5 (1975).

[95] It is possible that landowners and corporations may want to acquire insurance for such purposes. However, because the damage and injury from environmental pollution is often widespread, the insurance industry has thus far been reluctant to provide coverage for specific pollution damages. See Hourihan, Insurance Coverage for Environmental Damage Claims, 15 FORUM 551, 552 (1980).

[96] Rogers v. Bond Brothers, 279 Ky. 239, 130 S.W. 2d 22 (1939).

[97] Milhollin, supra note 75, at 11.

[98] State v. Exxon, 151 N.J. Super. 464, 376 A. 2d 1339 (Ch. Div. 1977).

[99] New Jersey Department of Transportation v. PSC Resources, Inc., 175 N.J. Super. 447, 419 A. 2d 1115 (Law Div. 1980).

[100] National Wood Pressures, Inc. v. Commonwealth, 489 Pa. 221, 414 A. 2d 37 (1980).

[101] Department of Environmental Protection v. Ventron Corporation, 94 N.J. 254, 463 A. 2d 893 (1983).

[102] Id.

[103] McAllister v. Atlantic Richfield Company, 662 P. 2d 1203 (Ks. 1983).

[104] Wilson v. Interlake Steel Company, 185 Cal. Rptr. 280, 649 P. 2d 922 (1982).

[105] 15 W. Fletcher, Cyclopedia of the Law of Private Corporations, Section 7122 n.1 (rev. perm. ed. 1973).

[106] Freling, Tax Consequence of Non Tax Motivated Aspects and Factors in the Sale of Corporate Business, (N.Y.U. Twenty-First Institute on Federal Taxation) 1107, 1131 (1963).

[107] Jennings Neff & Company v. Crystal Ice Company, 125 Tenn. 231, 232, 159 S.W. 1088, 1089 (1913).

[108] Good v. Lackwanna Leather Company, 96 N.J. Super. 439, 452-53, 233 A. 2d 201, 203 (Ch. Div. 1967).

[109] Murfee v. Phillips Petroleum Company, 492 S.W. 2d 667 (Tex. Civ. App. 1973).

[110] Schmitt v. Coad, 24 Wn. App. 661, 604 P. 2d 507 (1979), rev. denied, 93 Wn. 2d 1016 (1980).

[111] Real Estate Broker's Duty to His Purchaser: Washington State's Position and Some Projections for the Future, 17 GONZAGA L. REV. 79 (1982).

[112] See note 11, supra.

[113] Monty v. Peterson, 85 Wn. 2d 956, 540 P. 2d 1377 (1975).

[114] Id at 958.

[115] W. Prosser, supra note 92 at Section 30.

[116] Id at Section 33.

[117] See generally Texas Business and Commerce Code, Section 17.46 (1973).

[118] For a general discussion of the DTPA see Fambrough, The Death of Caveat Emptor, TIERRA GRANDE, Texas Real Estate Research Center, (1978).

[119] For a general discussion regarding the concept of professionalism of the real estate broker, see WRIGHT. Professionalization In Real Estate, reprinted by Texas Real Estate Research Center from REAL ESTATE TODAY Vol. 9, No. 10 (1976).

[120] Blacks Law Dictionary, 550 (5th ed. 1979).

VISUALS

Texas Courts Concerns

- Defendant knew or should have known
- Defendant breached standard of due care
- Causal connection exists
- Measure of damages exists

Specialized Legal Concepts

- Latency factor
- Statute of limitations
- Joint and several liability

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Preventive Steps

- Disclaimers
- Title opinions or title insurance
- Contracts
- Don't buy. Don't broker.
- Awareness

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Legal Theories

- Trespass
- Nuisance
- Negligence
- Strict liability

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Plaintiff Must Demonstrate:

- Defendant knew or should have known
- Defendant breached standard of due care
- Causal connection exists
- Measure of damages

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Intentional Discharge

Requisite Elements:

- Defendant interferred with plaintiff's rights
- Defendant committed act or omission
- Defendant's actions caused plaintiff's damages or injuries
- Defendant's actions intentional
- Specific amount is claimed

Accrual of Action Fixed When:

- Injury manifested
- Tortious conduct occurs
- Plaintiff discovers or should have discovered

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Delhi-Taylor V. Henry

- Sets liability to warn of hidden dangers
- Stated landowner's duty discharged when warning made

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Causation

Plaintiff must:

- Establish injury caused by hazardous waste
- Show defendant was cause or source of pollution

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Damage Amounts

- Range from $300 to more than $62,000
- No upper limit
- Limitations based on theory under which damages applied

Damages: Temporary or Permanent

Temporary Injury - Plaintiff's Recovery

- Damages up to time of trial

- or -

- Amount necessary for restoration of property

Permanent Injury

- Difference between reasonable market value immediately before and after injury

- or -

- Depreciation in market value

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Two-Year Statute of Limitation Begins:

- When injury occurs -- "Injury Rule"

- or -

- Injury is or should have been discovered -- "Discovery Rule"

Joint and Several Liability

Elements of Environmental Tort

- Suit need not join all wrongdoers
- Successor landowner or broker must plead proper cross claim, prove joint liability

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Successor Landowner Liability

- Successor landowner liability unclear
- Some courts say buyer discovers or should have discovered harmful condition within reasonable time and is liable
- Some courts say unless condition deliberately hidden, present owner liable
- Assumption may be if successor landowner knew or should have known of harm, liability follows

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Broker Liability

- Promoting
- Listing
- Selling
- Could be liable to:
  - seller
  - buyer
  - lender
  - closing agent
  - other brokers
  - client

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Broker Liability Issues

- Nature of duty owed client or injured party
- Standard by which duty weighed
- Texas Deceptive Trade Practices Act (TDTPA)
  - -- Standards of professionalism
  - -- Proficiency and licensing standards

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Preventive Steps

For successor landowner and real estate broker

- Disclaimers
- Title opinions and title insurance
- Contracts
- Decision not to buy or broker
- Awareness

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Personal Effects

- Must go beyond existing property to awareness of effects on others
    - Be aware of past uses

INSTRUCTORS EVALUATION

In order for the Texas Real Estate Research Center to be able to better assess the effectiveness of this packet, your input is requested. Please complete this form and return it to the address provided.

CONCEPT

1. What overall rating would you give this concept?

useless 1 2 3 4 5 6 7 8 9 10 invaluable

RATING THE ELEMENTS

2. How do you rate the elements of this TIP?

Content:

too general 1 2 3 4 5 6 7 8 9 10 too technical

Amount of material:

too little 1 2 3 4 5 6 7 8 9 10 too much

Format:

too simple 1 2 3 4 5 6 7 8 9 10 too complex

STRENGTHS AND WEAKNESSES

3. What were the strengths of the package? _____

_____

_____

_____

4. What were the weaknesses of the package? _____

_____

_____

SUGGESTIONS

5. What specific changes would you like to see in future TIPs?

_____

_____

6. What additional topics would you suggest for the TIP series?

a. _____ c. _____

b. _____ d. _____

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7. Do you expect using this packet in the next three months?

_____ yes _____ no

8. If you answered "yes" to question 7, to what classes will this material be presented?

_____

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